Appendix A

Supreme Court of Florida.
Harold Lee HARVEY, Appellant,
v.
STATE of Florida, Appellee.

No. SC95075.

June 15, 2006.
Rehearing Denied Jan. 8, 2007.

PER CURIAM.

Harold Lee Harvey, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. We previously issued an opinion in this case which only addressed the issue of whether counsel was ineffective for conceding Harvey's guilt of first-degree murder. We found counsel was ineffective and remanded the case for a new trial. While rehearing was pending, the United States Supreme Court granted certiorari review of this Court's opinion in *Nixon v. State*, 857 So.2d 172 (Fla.2003), which addressed the same issue. The court reversed our decision, *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), and held that the proper standard to be applied in cases involving counsel's concession of guilt is the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, we issue this opinion on rehearing and address all of the issues raised in Harvey's motion for postconviction relief. The opinion issued on July 3, 2003, is withdrawn, and this opinion is substituted in its place. For the reasons set forth below, we affirm the trial court's denial of rule 3.850 relief.

FACTS AND PROCEDURAL HISTORY

Harvey was charged with two counts of first-degree murder in the killings of William and Ruby Boyd, which occurred during the course of a robbery at the Boyds' home. After obtaining money from the Boyds, Harvey and Scott Stiteler, the codefendant, discussed what they were going to do with the victims and decided they had to kill them. Harvey shot both victims. *Harvey v. State*, 529 So.2d 1083, 1084 (Fla.1988).

At trial, Harvey was convicted of both counts of first-degree murder. The jury recommended death by a vote of eleven to one on each conviction. The sentencing judge found four aggravating circumstances[1] and as mitigating circumstances found Harvey had a low IQ and poor educational and social skills. *Id.* at 1088 n. 5.

On appeal, we affirmed Harvey's convictions and sentences of death. *Id.* at 1088. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. We issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the trial judge entered an order denying relief. Harvey appealed the denial of his postconviction motion, raising seventeen claims, and he also filed a supplemental habeas petition raising seven issues. We denied the petition for writ of habeas corpus, but reversed the

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[1] The murders were found to be (1) especially heinous, atrocious, or cruel; (2) committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission of or the attempt to commit robbery or burglary. *Id.* at 1087 n. 4, 104 S.Ct. 2052.

trial court's summary denial of the postconviction motion as to five issues and remanded to the trial court to determine if Harvey was denied effective assistance of counsel. *Harvey v. Dugger*, 656 So.2d 1253 (Fla.1995).[2] After an evidentiary hearing on these five issues, the trial court denied postconviction relief in an amended order.

Harvey now appeals the denial of postconviction relief, raising the following claims for review: (1) whether trial counsel was ineffective for failing to investigate and present evidence of mental mitigation; (2) whether trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (3) whether trial counsel was ineffective for admitting Harvey's guilt during opening statement; (4) whether trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[3] and (5) whether the cumulative effect of trial counsel's other errors constituted ineffective assistance of counsel. For the reasons explained below, we affirm the trial court's denial of relief.

DISCUSSION

I. Ineffective Assistance of Counsel/Guilt Phase

A. Admission of Guilt

Harvey claims that trial counsel was ineffective for admitting guilt without his consent during the guilt phase opening

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[2] This Court affirmed the denial of Harvey's remaining rule 3.850 claims. *See Harvey v. Dugger*, 656 So.2d 1253 (Fla.1995).

[3] In *Harvey v. Dugger*, 656 So.2d at 1256, we found the remainder of this claim to be procedurally barred, with the exception of the portion of the claim relating to the booking sheet, because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court.

statement. The trial court concluded that counsel's concession of guilt was not a concession of guilt to first-degree murder and thus was not improper. Harvey argues that trial counsel's statements to the jury were the functional equivalent of a guilty plea to both first-degree and second-degree murder, and that this concession of guilt, without Harvey's consent, constituted, per se, ineffective assistance of counsel.[4] The State argues that the trial court properly denied relief because trial counsel did not concede guilt to the crime charged.

Crucial to this issue's resolution is a determination of the appropriate standard of review. We initially reviewed this issue under our earlier decision in *Nixon v. Singletary*, 758 So.2d 618 (Fla.2000), which relied on the per se rule of ineffective assistance of counsel discussed in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). However, the United States Supreme Court held in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), that a defendant's claim of ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent, must be evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, in order to establish a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. As to the first or performance prong of *Strickland*, the defendant must establish that "counsel made errors so serious that counsel

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[4] Florida Rule of Criminal Procedure 3.171(c)(1) provides: Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* 466 U.S. at 687, 104 S.Ct. 2052. On the second or prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See id.* at 694, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. 2052.

Trial counsel began his arguments to the jury by stating:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law, that my client is guilty of murder. But he is. That doesn't by any means end your consideration of his case. The physical act that he committed was that he pulled the trigger on what was an automatic military weapon firing it into a room, discharging projectiles that hit human beings and killed them.
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> Now, what events lead up to that? What events place this young man in that chair in this room before these 14 people to determine not whether or not he's a murderer but merely what type of murderer he is?

Based on these statements, the State argues that trial counsel's strategy was obvious: trial counsel was attempting, in the face of Harvey's confession, to argue that while Harvey did commit murder, it was second-degree murder because it was done without premeditation. However, the State's position is not supported by the record when viewed with trial counsel's entire opening statement. In describing the

events leading up to the murder, trial counsel stated the following:

> And then it happened just about the way that Mr. Morgan said it did. When they got there Mrs. Boyd surprised them. She was outside the house. She was on her way out to get the garbage, they didn't have time to put their masks on. Mrs. Boyd came up to them, it was, I believe, shortly before nightfall, and asked them at the front door, "What are you doing out here?" And Stiteler looked at Lee and Lee looked at Stiteler and they knew that things were starting to go wrong.
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> And they had Mrs. Boyd walk back into the house and Mr. Boyd was in the house and they told them, "We want your money." And Stiteler ran around the house, all through the house looking for this cache of money, while Lee went into the bedroom with Mr. and Mrs. Boyd. Mr. and Mrs. Boyd then gave Lee what little bit they had, which was about $30 or $40 at the time. They didn't have any stash of money there. And Stiteler never did find the stash of money and they came down and completed the robbery. And little facts come out in cases that are always sometimes more indicative of what's really going on and is more indicative about the human beings involved than what the real plan was than other things. And the little fact in this case is Mr. Boyd asked for money for church, it was Saturday. And he said, "I have to go to church tomorrow, you're taking all my money." After all, he's thinking this is the neighbor kid. I know this kid, he lives over here. What's this crazy kid doing? And Lee gave him back money for church, because he didn't plan to kill him.
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> But then they went outside. And at that time Stiteler had the imposing weapon and Lee had the handgun. And at that point they began this frenzied conversation. They

were just outside the home and the door was half open. They asked Mr. and Mrs. Boyd to sit down at a card table in the room, and you'll see pictures of the room.

And they had this conversation and without question what was discussed during this conversation was whether or not to kill these two people. This is a crazy conversation for these two young men to be having but that's what it had gotten to.

(Emphasis added.) The emphasized language clearly demonstrates that trial counsel admitted that Harvey deliberated his plan to kill the Boyds. By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder.

However, because Harvey has failed to demonstrate prejudice based on counsel's concession of guilt, we need not address the deficiency prong of *Strickland*, and we deny 3.850 relief on this issue. *See* *Strickland v. Washington*, 466 U.S. at 697, 104 S.Ct. 2052 (holding there is no need for a court deciding an ineffective assistance of counsel claim to address both prongs of the inquiry if there as been an insufficient showing on one prong). In order to establish prejudice, a defendant must demonstrate that there is a reasonably probability that the result of the proceeding would have been different, but for counsel's unprofessional error. *See* *Valle v. State*, 778 So.2d 960, 965-66 (Fla.2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Trial counsel testified that he was trying to fashion a defense around Harvey's confession, which he knew the jury would

hear. Thus, counsel's strategy was to concede that Harvey committed second-degree murder and argue that he did not have the necessary intent for first-degree murder. The trial court's amended order on Harvey's motion for postconviction relief provides the following facts: Harvey was arrested on two counts of second-degree murder and one count of robbery. He was immediately interviewed. The interview lasted throughout the morning and into the afternoon. It was during this interview that Harvey made a confession. Harvey never requested a lawyer. After his first appearance, counsel was appointed and Harvey was indicted on two counts of first-degree murder. At trial, Harvey's full confession was admitted into evidence. In the confession, Harvey told police that he and the codefendant went to the victims' house to rob them. They cut the power lines from the telephone pole. They went to the victims' door and were surprised when Mrs. Boyd approached them from outside the house and asked them if she could help them. They were not wearing masks. At that point, Harvey brandished a gun and took Mrs. Boyd inside the house and told her he wanted her money. Harvey told police that after they took the victims' money, they stood there talking about what they were going to do. They decided to kill the Boyds. Harvey said, "Well, they know me. What are we gonna do?" The codefendant said he did not know, and said, "I guess we're gonna have to kill'em, shoot'em." Harvey indicated the victims heard the conversation. He said the victims started to run, so he shot them. He further said that he then ran out of the door, and the codefendant was waiting for him in Harvey's car. Harvey went back in the house for the shell casings, and because Mrs. Boyd was still moaning, he shot her again in the head. He left, got in the car, and as he and the codefendant drove down the street, he realized that he had left the victims' wallets in the house and that he had touched them. They turned around and went back. Harvey went into the house and retrieved the wallets.

Trial counsel said nothing more to the jury than what Harvey said during his confession to police. The evidence against Harvey was overwhelming even without counsel's admission that Harvey committed first-degree murder. *See, e.g.*, *Patton v. State*, 784 So.2d 380 (Fla.2000) (finding the facts counsel conceded were supported by overwhelming evidence and even if counsel had denied these facts, there was no reasonable possibility the jury would have rendered a different verdict). We cannot say, given all of the evidence introduced at trial, there is a reasonable probability that, but for any errors by counsel, the result of the proceeding would have been different, i.e., that our confidence in the outcome has been undermined.

Therefore, we affirm the trial court's denial of relief on this issue.

B. Motion to Suppress

Harvey next alleges that trial counsel was deficient in arguing the motion to suppress his confession made to police because counsel failed to introduce the police booking sheet pertaining to his arrest. Initially, the trial court summarily denied this claim. This Court reviewed the summary denial and remanded the issue for a hearing, stating that if the booking sheet was authentic, and if it was signed at 6:35 a.m., it "might bear on Harvey's claim of ineffective assistance of counsel in relation to the motion to suppress." *Harvey v. Dugger*, 656 So.2d at 1257.

On remand, the trial court conducted an evidentiary hearing and found that Harvey was arrested at 6:20 a.m. He arrived at the Okeechobee County jail at approximately 6:30 a.m. The booking officer only asked Harvey his name and noted a $3 million bond. Harvey was then immediately taken to an

office and interviewed by Florida Department of Law Enforcement Officer Pete Lanier, Okeechobee County Chief Deputy O.L. Raulerson, and Deputy Sheriff Gary Hargraves. At no time during the interview, which lasted through the afternoon, did Harvey ask for a lawyer. Prior to making his statements, Harvey signed five forms waiving his *Miranda*[5] rights, including the right to counsel.

Harvey made two incriminating statements during the course of the interview. The booking sheet was completed at approximately 5:50 p.m. Rose Bennett, a corrections officer, testified at the evidentiary hearing that she completed the booking sheet, including the portion of the booking sheet regarding Harvey's invocation of his right to counsel, prior to the first appearance hearing. She stated that she must have checked the box concerning a request for an attorney just before the hearing because the public defender was present then and had seen Harvey, and she included his name on the sheet. The first appearance hearing was held at 6:10 p.m. before County Judge Burton Connor. Harvey was then photographed and fingerprinted at approximately 7:15 p.m. Based upon these factual findings, the trial court concluded that the introduction of the booking sheet would not have been helpful because the booking sheet indicates that Harvey requested a lawyer after he made the incriminating statements.

Because the booking sheet was completed and the request for counsel was made after Harvey's confession, trial counsel was not deficient for failing to submit the booking sheet in support of the motion to suppress. This Court remanded this matter for an evidentiary hearing to determine if the booking

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[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

sheet was signed at 6:35 a.m. It has been determined that the booking sheet was not signed at 6:35 a.m.; therefore, Harvey's claim that counsel was deficient has not been demonstrated.

II. Ineffective Assistance of Counsel/Penalty Phase
A. Failure to Investigate and Present Evidence of Mental Mitigation

Harvey claims his trial counsel was ineffective for failing to ensure that he received a competent mental health examination. Ineffective assistance of counsel claims are mixed questions of law and fact. This Court therefore conducts "an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings." *State. v. Riechmann*, 777 So.2d 342, 350 (Fla.2000); *see also Cherry v. State*, 781 So.2d 1040 (Fla.2000). The trial court's factual findings will be upheld when they are supported by competent, substantial evidence in the record. *See Stephens v. State*, 748 So.2d 1028, 1035 (Fla.1999).

Harvey alleges that trial counsel failed to fully investigate his background for mental health mitigation. The trial court found, however, that trial counsel retained psychologist Dr. Fred Petrilla, met and ate dinner with Harvey's parents and siblings on two occasions, and obtained Harvey's school records. The trial court also found that Dr. Petrilla interviewed Harvey's family and coworkers and that Dr. Petrilla was given background material concerning Harvey. These findings are supported by the record.

At the evidentiary hearing, trial counsel testified that he was concerned with Harvey's mental health and hired Dr. Petrilla for the purpose of conducting a mental health evaluation. Counsel indicated that he provided Dr. Petrilla with case materials and medical records. Counsel testified that neither

Harvey nor Harvey's family gave him any indication of possible mental health mitigators, although they did inform counsel that Harvey had been in a serious car accident when he was sixteen years old. Trial counsel said it was determined that Harvey had never been institutionalized. Dr. Petrilla testified at the evidentiary hearing that he performed a personality assessment and several other tests on Harvey. He also said he tested Harvey to determine his IQ. Dr. Petrilla further testified that he and trial counsel discussed the results of these tests. As a result of this testing, Dr. Petrilla recommended that Harvey be given antidepressant medications and receive psychotherapy with assertiveness training. He tested Harvey for organic brain damage, but he did not diagnose Harvey as having brain damage. Dr. Petrilla's testimony at the penalty phase of the trial was consistent with his investigation. He testified that Harvey was depressed, had low-self esteem, had a mental age of eighteen years and a physical age of twenty-three, did not have brain damage, and was impulsive.

Harvey argues that trial counsel was deficient because he did not retain a psychiatrist as Dr. Petrilla had recommended. As the trial court found, trial counsel and Dr. Petrilla conferred, and Dr. Petrilla recommended Dr. Carmen Ebalo as an examining psychiatrist for Harvey. Harvey argues that because his own psychologist recommended that he be evaluated by a psychiatrist, trial counsel was deficient in failing to retain one.

Although Dr. Petrilla suggested it, trial counsel testified at the evidentiary hearing that he did not employ a psychiatrist because he felt the jury might see calling more than one mental health expert as trying too hard to make an excuse for bad behavior, especially given the fact that Harvey had never been treated for mental illness. Based on the evidence available to trial counsel, including his interviews with

Harvey's parents, trial counsel's decision was consistent with his sound trial strategy to present Harvey as a good person with a positive family upbringing. The evidence presented at the postconviction hearing painted Harvey in a different light and would have been inconsistent with the trial strategy that was employed.

While in hindsight counsel could have pursued a different penalty phase strategy, the strategy counsel employed was not unreasonable and did not fall outside the broad range of competent performance "under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. In considering a claim of ineffective assistance of counsel, we must fairly assess trial counsel's performance at the time of trial based on the information he had. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel, Harvey must show (1) that the identified acts or omissions of counsel were deficient or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. *See Banks v. State*, 842 So.2d 788, 790 (Fla.2003); *Rose v. State*, 675 So.2d 567, 571 (Fla.1996).

Harvey has not demonstrated that trial counsel was deficient in his investigation of possible mental health mitigation. This Court has found counsel's performance to be deficient where counsel "never attempted to meaningfully investigate

mitigation" although substantial mitigation could have been presented. *Rose*, 675 So.2d at 572; *see also Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.1995) (finding that a woefully inadequate investigation failed to reveal a large amount of mitigating evidence such as prior psychiatric hospitalizations and statutory mental health mitigators); *State v. Lara*, 581 So.2d 1288, 1289 (Fla.1991) (finding counsel virtually ignored preparation for penalty phase). This is not the case here. Consistent with the trial court's factual findings, trial counsel conducted a reasonable investigation into Harvey's mental health background and incorporated his findings into a penalty phase strategy.

Trial counsel explained his strategy at the evidentiary hearing. He chose to present Harvey as a "good person." Trial counsel wanted the jury to see that these murders were inconsistent with Harvey's character and were committed without premeditation in the midst of a robbery gone wrong. Trial counsel testified that he thought about this strategy and decided to implement it after the motion to suppress Harvey's statement was denied. Trial counsel testified that he thought it was important to carry a consistent theme throughout both phases of the trial and believed this was Harvey's best chance for a life sentence. In cases where counsel did conduct a reasonable investigation of mental health mitigation and then made a strategic decision not to present this information, this Court has affirmed the trial court's finding that counsel's performance was not deficient. *See Asay v. State*, 769 So.2d 974, 985 (Fla.2000). We agree with the trial court and find that trial counsel's strategy was not unreasonable under the circumstances and did not fall outside the range of professional competent assistance.

B. Failure to Investigate and Present Other Mitigating Evidence

Harvey next argues that trial counsel was ineffective in failing to investigate and present the mitigating evidence of his personal background. We disagree because the record supports the trial court's findings and conclusion that counsel conducted a reasonable investigation and presented this evidence at the penalty phase proceeding. At the conclusion of the postconviction evidentiary hearing, the trial judge made the following findings in his order denying relief:

> Mr. Watson met with Mr. Harvey's mother and father and siblings and ate dinner in their home on two occasions. He felt they were good, decent people. He also obtained Mr. Harvey's school records. He did not uncover any evidence that Harvey used or abused cocaine or marijuana or Quaaludes, that he drove an automobile drunk, or that his parents abused him. He determined that Harvey was involved in a very serious automobile accident at age 16 where he lost consciousness and a female companion was killed. He determined that Harvey had never been institutionalized.
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> During the penalty phase the defendant presented 16 witnesses including Dr. Petrilla who testified that he had been a state's witness in earlier cases and that this was the first time he had testified in a death penalty case for a defendant.
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> The evidence including Dr. Petrilla's testimony showed that Harvey was depressed, had low self-esteem and a mental age of 18 and physical age of 23, did not have brain damage, and was impulsive. Evidence was also presented that he was hard-working, from a good, decent family who would be negatively effected [sic] if he would be executed,

that he had been a loving brother to his disabled sister, that the crime was out of character, and that he was pressured by his wife to provide things he could not financially do. Evidence showed that he was involved in the fatal accident at age 16 and would be able to adapt to a life sentence in prison.

Thus, it is evident that trial counsel presented much of the evidence that postconviction counsel has presented and that trial counsel presented the evidence that was uncovered during his investigation of this case.

As the trial judge found, sixteen witnesses testified on Harvey's behalf at the penalty phase proceeding concerning his background and history. These witnesses included Harvey's parents and siblings, who testified concerning Harvey's history and background. Other witnesses who testified included family friends, family members, an employer, a coworker, and several teachers. In sum, the witnesses stated that Harvey had a normal childhood, was a loving son, brother, and friend, was generally a good person, and came from a loving and hard-working family. The jury viewed several childhood photographs of Harvey with his siblings, as well as home movies of various family outings. This evidence is consistent with the general theme that the murders were out of character for Harvey.

At the evidentiary hearing, Harvey presented witnesses who painted a new and different picture of his background, including extreme poverty, physical abuse, substance abuse, and mental problems. The evidence Harvey now presents supports an entirely different theory for the penalty phase. However, speculation that another theory of defense would have been more successful is not sufficient to establish the deficiency prong of *Strickland.* In *Strickland,* the Supreme Court stated that "strategic choices

made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690, 104 S.Ct. 2052. *See also* *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (stating that "the deference owed such strategic judgments" under *Strickland* is defined "in terms of the adequacy of the investigations supporting those judgments"). The record clearly demonstrates that counsel conducted an adequate investigation into Harvey's background, and that counsel presented the evidence that was discovered during his investigation to argue for a sentence less than death.

We therefore find that counsel's performance was not deficient.

C. Other Alleged Penalty Phase Errors

Harvey next argues that trial counsel committed other penalty phase errors and that the cumulative effect of these errors warrants reversal. He claims that counsel failed to know the law relating to the mitigating factor of "no significant history of prior criminal activity," that counsel conceded several aggravating factors, that counsel failed to investigate potential aggravating and mitigating factors, that counsel encouraged the introduction of irrelevant and highly prejudicial testimony, that counsel permitted nonstatutory aggravating evidence of lack of remorse, and that counsel failed to present evidence on Harvey's behalf prior to sentencing.

Harvey claims that counsel should have waived the mitigating factor of lack of significant history of prior criminal activity because otherwise the State was allowed to present evidence of his escape from jail after his arrest on these charges. At the time of this trial, acts committed prior to sentencing and after the murder could be considered for

purposes of sentencing. *See* Ruffin v. State, 397 So.2d 277, 283 (Fla.1981). In this case, the State was permitted to introduce evidence of Harvey's escape. In fact, during the guilt phase of the trial, the State introduced evidence of the escape and the theft of a motor vehicle. Because this evidence had already been presented to the jury during the guilt phase, we agree with the trial court that counsel was not ineffective for failing to waive the mitigating factor of lack of significant criminal history.

Next, Harvey argues that trial counsel improperly attempted to distance himself from Harvey in arguments to the jury by expressing revulsion at what Harvey had done. The trial court reviewed the statements, and found that counsel's final argument was a "well-organized plea for mercy." This finding is supported by the record. Trial counsel argued that the killings were out of character for Harvey and emphasized that the killings occurred while Harvey was in a state of panic after the robberies were completed. Trial counsel also emphasized that there was no intent to kill at the time Harvey went to the Boyds' home. At the evidentiary hearing, trial counsel explained that his strategy for the closing penalty phase argument was to use the guilt phase to set the tone for the penalty phase and to maintain consistency between both phases. The comments upon which Harvey relies were clearly part of counsel's overall strategy to portray Harvey as a panicked young man who did not intend to commit murder. Trial counsel explained that given the jury's decision to convict, he could not tell them that the decision was unreasonable. Rather, counsel acknowledged the verdict and then made a plea that Harvey was deserving of mercy.
Harvey relies heavily on *Clark v. State*, 690 So.2d 1280 (Fla.1997), in support of this claim. In *Clark*, this Court held that trial counsel failed to function reasonably as an effective counsel when he indicated his own doubts or distaste for the case and when he attacked the defendant's character and

emphasized the seriousness of the crime. *Id.* at 1283. Furthermore, in *Clark*, trial counsel "virtually encouraged the jury to impose the death penalty, [and] he assisted the prosecution in making its case." *Id.* In the case now before us, trial counsel did not encourage the jury to impose the death penalty, but instead maintained a consistent theme, pleading for mercy and a life sentence. Trial counsel's performance was not deficient.

Harvey also argues that trial counsel's failure to investigate potential aggravating and mitigating factors constituted ineffective assistance of counsel. He argues that counsel failed to investigate evidence concerning the heinous, atrocious, or cruel aggravating factor. Harvey bases this claim on the sentencing court's finding that that the victims had, in fact, heard conversations between Harvey and his codefendant about disposing of the witnesses. Harvey argues that trial counsel should have challenged this evidence because the television was loud and one of the victims was hard of hearing. However, as the trial court found, the evidence that the victims began to run and the defendant's own statement support the conclusion that the victims heard the conversation that took place between Harvey and the codefendant wherein they discussed killing the victims. Ineffective assistance of counsel has not been demonstrated.

Harvey also asserts that trial counsel should have pursued the theory that he was substantially dominated by the codefendant. The trial court found that counsel had requested a jury instruction on substantial domination and the request was denied. Counsel then decided not to argue that Harvey was under substantial domination by another because the evidence did not support this theory. Harvey was older than his codefendant, they went to the crime scene in Harvey's car, Harvey was married with marital pressures, and Harvey was the shooter and took the automatic weapon from

his codefendant's hands immediately before shooting the victims. These findings are supported by the record. Trial counsel was not deficient for failing to argue the mitigating factor of substantial domination.

Harvey next claims trial counsel encouraged the introduction of irrelevant and highly prejudicial testimony. A guard at the Okeechobee County jail was allowed to testify concerning a statement made by Harvey to another inmate to the effect that he had killed twice, had nothing to lose, and would kill again. The trial judge ruled that only the first part of the statement was admissible. However, defense counsel asked the trial judge to admit the entire statement. Defense counsel wanted to put the entire statement into context by explaining the circumstances under which it was made. Counsel questioned the officer about the statement and demonstrated that the other inmate initiated an altercation with Harvey. Counsel's examination showed that Harvey had ignored the other inmate for one-half hour before the statement was made. Under these circumstances, we cannot say that counsel's strategy in handling this matter amounted to ineffective assistance of counsel.

Next, Harvey asserts that trial counsel permitted the admission of nonstatutory aggravating evidence of lack of remorse in violation of *Randolph v. State*, 562 So.2d 331 (Fla.1990). The record reflects that the defense relied on remorse as a mitigating factor during the penalty phase and the State attempted to rebut this factor. Even though the defense argued remorse as a mitigating factor, defense counsel nonetheless objected to the State presenting any evidence on lack of remorse. Counsel's objection to the State's evidence on lack of remorse was overruled. Thus, Harvey has failed to demonstrate ineffective assistance of counsel.

Finally, Harvey argues that trial counsel was ineffective because the sentencing occurred two hours after the jury returned its advisory verdict, and trial counsel only said, "We know of no legal cause of non-sentencing." Harvey argues that counsel was ineffective because he called no witnesses and made no argument for a life sentence. However, Harvey does not allege any new information that counsel could have presented at this stage. Thus, this claim is insufficiently pled, and Harvey has failed to demonstrate that trial counsel's performance was deficient.

Because Harvey has failed to show that any of the alleged errors demonstrate both the deficiency and prejudice prongs of the test set forth in *Strickland*, there are no errors to consider cumulatively. As the trial court found, "[T]he overall and specific effects of Mr. Watson's efforts were effective assistance of counsel." We affirm the trial court's order. *See Downs v. State*, 740 So.2d 506, 509 (Fla.1999) (holding that where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail).

CONCLUSION

For the reasons set forth above, we affirm the trial court's denial of postconviction relief.

It is so ordered.

WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which PARIENTE, C.J., concurs.

ANSTEAD, J., concurring in part and dissenting in part.

While I concur in the majority opinion in many respects, including its decision to grant rehearing on the *Nixon* issue, I cannot concur in the majority's ultimate conclusion that the defendant is not entitled to a new penalty phase proceeding. It is apparent that trial counsel's conduct was deficient in numerous respects and that there was no genuine adversarial testing of the appropriate penalty to be imposed in this case.

First, as to the *Nixon* issue, it is apparent from the postconviction proceedings that counsel's conduct was deficient. In fact, counsel gave detailed testimony that his strategy was to demonstrate that the defendant was guilty at most of second-degree murder, a crime to which the death penalty does not apply. He testified that he probably told the defendant of this second-degree murder strategy and that it was this theory that he outlined in his opening statement. However, as detailed in the majority opinion, defense counsel did *not* outline a second-degree murder case in his opening statement. Rather, as the majority explains, defense counsel conceded the defendant's guilt to premeditated murder, i.e., first-degree capital murder. Unfortunately, this strategy of conceding guilt to two senseless killings permeated counsel's performance. Counsel's summations to the jury in the guilt and penalty phases simply demonstrated his inability to do much more than show his frustration at having to defend the case.

Second, counsel's frustration may have been understandable if he had done a thorough job of investigating the defendant's life for evidence of mitigation. However, he was content with a superficial investigation. For example, while counsel did consult with a psychologist, someone without a medical degree or license to practice medicine, he then proceeded to ignore the psychologist's pointed and repeated advice that a medically trained and licensed psychiatrist be consulted. Of

course, we now know because of the unrebutted evidence presented at the postconviction evidentiary hearing that had the psychiatrist been consulted, numerous and serious mental problems, including organic brain damage, would have been detected. In addition, the causes for these serious mental problems growing out of the defendant's deprived and abusive childhood, and at least two major traumatic events, could have been properly developed and presented to the judge and jury, including evidence of several important statutory mitigators and extensive nonstatutory mitigation. But, due to counsel's blatant neglect in heeding the psychologist's advice, none of this powerful mitigating evidence was ever investigated, developed, or presented. As our death penalty jurisprudence makes clear, counsel's duty is to thoroughly investigate first, and then evaluate in order to develop a sound defense strategy. We have a clear breach of counsel's duty here and substantial prejudice as a result. In the face of an almost apologetic case for mitigation, the jury's recommendation for death was virtually a certainty.

Finally, after the jury returned its recommendation of death, counsel essentially abandoned his client. Defense counsel presented absolutely no case for life to the true sentencer, the trial judge, and of course, the trial judge simply followed the jury's recommendation. Because it is the trial court that does the actual sentencing, it is essential that counsel not abandon his client and that counsel be prepared to make a case for life to the trial court. That did not happen here.

I would hold that we cannot have confidence in the outcome of proceedings so infected by trial counsel's neglect and ineffectiveness. While counsel's neglect may ultimately have made no difference in the establishment of his guilt, the record in this case clearly establishes that the adversarial testing mandated by *Strickland* did not take place in the penalty phase proceedings of this case. We should remand

for a new penalty phase, so that this essential adversarial testing can take place before a reasoned and informed judgment is rendered on life or death.

PARIENTE, C.J., concurs.

Appendix B

SUPREME COURT OF FLORIDA

No. SC95075

HAROLD LEE HARVEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 3, 2003]

PER CURIAM.

Harold Lee Harvey, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we reverse the trial court's denial of rule 3.850 relief and remand to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Harvey was charged with two counts of first-degree murder in the killings of William and Ruby Boyd during the course of a robbery at the Boyds' home. After obtaining money from the victims, Harvey and his codefendant discussed what they were going to do with the Boyds and decided they would have to kill them. Harvey shot both victims. Harvey v. State, 529 So. 2d 1083, 1084 (Fla. 1988).

At trial, Harvey was convicted of the first-degree murders of the Boyds. The jury recommended death by a vote of eleven to one. The sentencing judge found four aggravating factors[1] and as a mitigating circumstance found that Harvey had a low I.Q. and poor educational and social skills Id. at 1088 n.5.

On appeal, we affirmed Harvey's convictions and sentences of death. Id. at 1088. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. We issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the trial judge entered an order denying relief. Harvey appealed the denial of his postconviction motion, raising seventeen claims, and

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[1] The murders were found to be: (1) especially heinous, atrocious, or cruel; (2) committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission of or the attempt to commit robbery or burglary. Id. at 1087 n.4.

also filed a supplemental habeas petition raising seven issues. We denied the petition for writ of habeas corpus, but reversed the trial court's summary denial of the postconviction motion as to five issues to determine if Harvey was denied effective assistance of counsel. Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).[2] After an evidentiary hearing on these five issues, the trial court denied postconviction relief in an amended order.

Harvey now appeals the denial of postconviction relief, raising the following claims for review: (1) whether trial counsel was ineffective for failing to investigate and present evidence of mental mitigation; (2) whether trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (3) whether trial counsel was ineffective for admitting Harvey's guilt during opening statement; (4) whether trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[3] and (5) whether the cumulative effect of trial counsel's other errors constituted ineffective assistance of counsel. However, because we find the resolution of claim (3) to be dispositive, claims (1), (2), (4), and (5) are rendered moot in light of this opinion. See Clark v. State, 690 So. 2d 1280, 1282 n. 4 (Fla. 1997).

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[2] This Court denied Harvey's remaining rule 3.850 claims. See Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).

[3] In Harvey v. Dugger, 656 So. 2d at 1256, we found the remainder of this claim to be procedurally barred with the exception of the portion of the claim relating to the booking sheet because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court.

DISCUSSION

Harvey claims trial counsel was ineffective for admitting guilt without Harvey's consent during the guilt phase opening statement. Specifically, Harvey argues that trial counsel's statements to the jury were the functional equivalent of a guilty plea to both first-degree and second-degree murder, and that this concession of guilt, without Harvey's consent, constituted per se ineffective assistance of counsel.[4] The State, on the other hand, argues that the trial court properly denied relief because trial counsel did not concede guilt to the crime charged.

Crucial to this issue's resolution is a determination of the appropriate standard of review. As we have discussed numerous times, the Strickland v. Washington, 466 U.S. 668 (1984), standard normally applies to ineffective assistance of counsel claims. Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Id. at 687. However, there are instances where the rule announced in United States v. Cronic, 466 U.S. 648 (1984), applies to decisions of trial counsel. In Cronic, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel

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[4] Florida Rule of Criminal Procedure 3.17 1 (c)(l) provides:

> Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 (1959), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966)).

Cronic, 466 U.S. at 658-59 (emphasis added) (footnotes omitted). Thus, "Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel." Nixon v. Singletary, 758 So. 2d 618, 622 (Fla. 2000).

To determine which test applies, we must first decide whether Harvey's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel began his arguments to the jury by stating:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law, that my client is guilty of murder. But he is. That doesn't by any means end your consideration of his case. The physical act that he committed was that he pulled the trigger on what was an automatic military weapon firing it into a room, discharging projectiles that hit human beings and killed them.
>
> Now, what events lead up to that? What events place this young man in that chair in this room before these 14 people to determine not whether or not he's a murderer but merely what type of murderer he is?

At this point, the State argues that trial counsel's strategy was obvious: trial counsel was attempting, in the face of Harvey's confession, to argue that while Harvey did commit murder, it was second-degree murder because it was done without premeditation. However, a review of trial counsel's entire opening statement tells a different story. In describing the events leading up to the murder, trial counsel stated the following:

> And then it happened just about the way that Mr. Morgan said it did. When they got there Mrs. Boyd surprised them. She was outside the house. She was on her way out to get the garbage, they

didn't have time to put their masks on. Mrs. Boyd came up to them, it was, I believe, shortly before nightfall, and asked them at the front door, "What are you doing out here?" And Stiteler looked at Lee and Lee looked at Stiteler and they knew that things were starting to go wrong. And they had Mrs. Boyd walk back into the house and Mr. Boyd was in the house and they told them, "We want your money." And Stiteler ran around the house, all through the house looking for this cache of money, while Lee went into the bedroom with Mr. and Mrs. Boyd. Mr. and Mrs. Boyd then gave Lee what little bit they had, which was about $30 or $40 at the time. They didn't have any stash of money there. And Stiteler never did find the stash of money and they came down and completed the robbery. And little facts come out in cases that are always sometimes more indicative of what's really going on and is more indicative about the human beings involved than what the real plan was than other things. And the little fact in this case is Mr. Boyd asked for money for church, it was Saturday. And he said, "I have to go to church tomorrow, you're taking all my money." After all, he's thinking this is the neighbor kid. I know this kid, he lives over here. What's this crazy kid doing? And Lee gave him back money for church, because he didn't plan to kill him.

But then they went outside. And at that time Stiteler had the imposing weapon and Lee had the handgun. And at that point they began this frenzied conversation. They were just outside the home and the door was half open. They asked Mr. and Mrs. Boyd to sit down at a card

> table in the room, and you'll see pictures of the room.
>
> And they had this conversation and without question what was discussed during this conversation was whether or not to kill these two people. This is a crazy conversation for these two young men to be having but that's what it had gotten to.

(Emphasis added.) The emphasized language above clearly demonstrates that trial counsel admitted that Harvey deliberated his plan to kill the Boyds. By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt to first-degree murder. Trial counsel's comments were the functional equivalent of a guilty plea, and for this reason, we find that trial counsel's performance failed to subject the prosecution's case to meaningful adversarial testing under Cronic and therefore must be presumed ineffective. See Atwater v. State, 788 So. 2d 223, 231 (Fla. 2001) (explaining when the Cronic presumption is applicable).

We faced a similar situation in Nixon. In that case, the defendant argued that trial counsel was ineffective because his opening and closing arguments contained statements that were the functional equivalent of a guilty plea. 758 So. 2d at 620. We agreed, and "conclude[d] that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." Id. at 624 (emphasis added). In this case, the trial court has already conducted an evidentiary hearing on this issue, and made the following findings of facts and conclusion of law:

> Because [trial counsel] felt the confession "was the case," he had discussed with Mr. Harvey

during case preparation what his defense could be and that they probably would admit some degree of murder if the confession was not suppressed. They specifically discussed on more than one occasion that if the confession was ruled admissible, [trial counsel] would make an opening statement that Harvey was guilty of murder, but that it was second degree murder and not either premeditated or felony murder. Mr. Harvey said he understood this defense tactic.

[Trial counsel] stated to the jury during his opening statement that the evidence would show a murder was caused by a frightened and confused young Mr. Harvey after he and his friend had robbed the victims. He stated that Harvey did not intend to kill.

Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

However, the trial court's factual findings are not supported by the record.

As outlined above, trial counsel's opening statement actually conceded first-degree murder because trial counsel stated that "without question" Harvey discussed whether to kill the Boyds before the murder. Trial counsel also indicated that Harvey and his codefendant were in the process of robbing the victims when the murders were committed, thereby conceding Harvey's guilt to felony murder. Testimony from the evidentiary hearing demonstrates that, at best, trial counsel informed Harvey of his strategy to concede guilt to second-degree murder. Trial counsel testified that in light of Harvey's confession, "I was offering [the jury] the opportunity of convicting him of murder while saving his life and pointing out that second degree murder is murder . . . . They could convict him of murder and feel as though they had done their civic duty while still saving his life." Harvey, however, testified that he did not consent to trial counsel's statements to the jury conceding any degree of murder, and even so, "[s]ilent acquiescence is not enough." Nixon, 758 So. 2d at 624. While we would be inclined to agree with the trial court's conclusion had trial counsel conceded only second-degree murder, we cannot agree in light of trial counsel's opening remarks to the jury.

We are aware that Nixon did not involve a confession. However, even in cases involving a confession, the jury is free to give as much or as little weight to the confession as it wishes. As we explained in Nixon: "In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." 758 So. 2d at 625. In other words, trial counsel cannot be excused for conceding guilt and, under the facts of this case, failing to subject the prosecution's case to a meaningful adversarial testing just

because Harvey confessed to the crime charged. We made it very clear in Nixon that a defendant must give an "affirmative, explicit acceptance" of counsel's strategy to concede guilt because conceding guilt is the functional equivalent of a guilty plea. Id. at 624; see also Atwater, 788 So. 2d at 231 ("Thus, in Nixon we held that unless the defendant expressly consented to this strategy, or in effect knowingly and voluntarily consented to decline meaningful adversarial testing of the prosecution's case, then prejudice to the defendant is presumed and counsel is thus per se ineffective."). Here, Harvey pled not guilty to the charges against him, including first-degree murder. Trial counsel's concessions, however, rendered that not guilty plea a nullity.

CONCLUSION

In sum, we find that trial counsel conceded Harvey's guilt to first-degree murder by stating, in his guilt phase opening statement, that Harvey acted with premeditation and that the murder was committed during the course of a robbery. Trial counsel testified at the evidentiary hearing that he conceded guilt in response to the denial of the motion to suppress Harvey's confession; however, trial counsel also repeatedly testified that his strategy was to concede guilt only to second-degree murder by arguing Harvey did not intend to kill the Boyds. A close reading of trial counsel's opening statement shows that he did otherwise. Thus, we conclude that under Nixon and Cronic, trial counsel's performance in this case constituted per se ineffective assistance of counsel. For this reason we reverse the denial of Harvey's motion for postconviction relief and remand with directions that his convictions be vacated.

It is so ordered.

ANSTEAD, C.J., PARIENTE and QUINCE, JJ., and SHAW, Senior Justice, concur.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., dissenting.

For many of the same reasons that I dissented in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), I dissent here. In addition, I find this decision, in its application of United States v. Cronic, 466 U.S. 648 (1984), to be in conflict with this Court's decision in Atwater v. State, 788 So. 2d 223 (Fla. 2001), and the Eleventh Circuit's decision in McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984).

However, it is also my view that here the present majority does not follow what this Court did in remanding this case for an evidentiary hearing on this issue in 1995 in Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995):

> In claim 1(f), Harvey argues that he was denied effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Harvey's guilt in the opening argument. Harvey maintains that this concession nullified his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Because the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990), cert. denied, 502 U.S. 854 (1991).

(Emphasis added.) In that 1990 Nixon opinion, this Court did not make a decision that Cronic applied to Nixon. All this Court did was state that it declined to dispose of Nixon's claim on the state of the record at that time.

The point here, though, is that this Court now has before it the very same opening statement by defense counsel that it did in its 1995 consideration of this case. If this Court believed that "trial counsel's comments were the functional equivalent of a guilty plea" and, based upon Cronic, that trial counsel's representation of Harvey was presumptively ineffective, there was no need to remand the case for an evidentiary hearing.

Yet, this Court in 1995 did not hold that Cronic applied based upon the opening statement and did remand for an evidentiary hearing. The trial court held an extensive, six-day evidentiary hearing and entered a thorough and detailed order. In that order, the trial judge, based upon the evidence at the evidentiary hearing which this Court had directed that the trial judge have, found:

> The argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of the strategy between counsel and defendant before the statement was made to the jury.

State v. Harvey, No. 86-75 CF, order at 11 (Fla. 19th Cir. Ct. order filed Jan. 26, 1999) (emphasis added). The trial court did precisely what this Court ordered eight years ago. I find no basis under the law of this case to now reverse the trial judge on the basis that the present majority of this Court comes to the conclusion that counsel's opening statement, given in 1986, was per se ineffective assistance of counsel.

To the contrary, to grant a new trial to Harvey on this basis is plainly wrong.

An Appeal from the Circuit Court in and for Indian River County,

Dwight Geiger, Judge - Case No. 86-322B

Ross B. Bricker, Jeffrey A. Koppy and Ellen C. Lamond of
Jenner & Block,
Chicago, Illinois,

for Appellant

Charles J. Crist, Jr., Attorney General, and Celia A. Terenzio,
Assistant Attorney General,
West Palm Beach, Florida,

for Appellee

Appendix C

Supreme Court of Florida.
Harold Lee HARVEY, Jr., Petitioner,
v.
Richard L. DUGGER, etc., et al., Respondent.
Harold Lee HARVEY, Jr., Appellant,
v.
STATE of Florida, Appellee.

Nos. 75841, 81836.

Feb. 23, 1995.
Rehearing Denied June 8, 1995.

PER CURIAM.

Harold Lee Harvey, Jr., a prisoner under a sentence of death, petitions this Court for a writ of habeas corpus and appeals the trial court's denial of postconviction relief. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const.; Fla.R.Crim.P. 3.850.

Harvey was convicted of the first-degree murders of William and Ruby Boyd. The facts of the murders are set out in *Harvey v. State*, 529 So.2d 1083 (Fla.1988), *cert. denied*, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989), in which we affirmed Harvey's convictions and sentences of death. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. This Court issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the judge entered an order

denying relief and this appeal followed. Harvey also filed a supplemental habeas petition.

3.850 Motion

Harvey raised seventeen claims in his postconviction motion: (1)(a) trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[1] (1)(b) trial counsel was ineffective for failing to challenge juror Brunetti for cause or peremptorily after she stated she could not be impartial; (1)(c) trial counsel was ineffective for failing to object to the trial court's change of venue to Indian River County; (1)(d) trial counsel was ineffective for making claims in his opening statement that were not later established; (1)(e) trial counsel was ineffective for failing to raise a valid objection to the admission of hearsay testimony relating to Harvey's pretrial escape; (1)(f) trial counsel was ineffective for admitting Harvey's guilt during opening statements; (2)(a) trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (2)(b) trial counsel was ineffective for failing to establish the substantial domination

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[1] Harvey maintains that the following arguments should have been made: (a) Harvey invoked his right to counsel when he was booked into the jail, but the police ignored his request; (b) the initial *Miranda* warnings that were given were incomplete and misleading; (c) Harvey invoked his right to counsel during questioning, but his request was ignored; and (d) Harvey was not promptly taken before a judicial officer for his first appearance. The claim also asserted that trial counsel failed to obtain the services of a psychiatrist who would have testified that Harvey suffered from organic brain damage and was subject to becoming quickly and easily confused in stressful situations. The claim further asserted that trial counsel failed to effectively argue that the police refused to allow a public defender to speak with Harvey and coerced Harvey into making a confession by using a visitation with his wife as a bargaining tool.

mitigating factor; (2)(c) trial counsel was ineffective during his penalty-phase closing argument; (2)(d) trial counsel was ineffective for failing to waive the no significant history mitigating factor; (2)(e) trial counsel was ineffective for allowing the State to anticipatorily rebut evidence of remorse when such an argument was not made; (2)(f) trial counsel was ineffective for failing to present evidence or argument at the final sentencing hearing; (2)(g) trial counsel was ineffective for failing to investigate and confirm that the victims overheard Harvey and the co-defendant deciding to kill them; (3) trial counsel was ineffective for failing to ensure that Harvey received a competent mental health examination; (4) Harvey was tried by a de facto eleven-person jury; (5)(a) the trial court rendered trial counsel ineffective by refusing to hear and rule on Harvey's motion to suppress prior to jury selection; (5)(b) the trial court rendered trial counsel ineffective by denying counsel's motion for co-counsel; (5)(c) the trial court rendered trial counsel ineffective by denying counsel's motion for continuance made between the guilt and penalty phases of the trial; (6) the trial court failed to expressly evaluate all mitigating factors, failed to find each proposed mitigating circumstance, and failed to weigh those factors against the aggravating factors; (7) fundamental changes in the law require resentencing because the trial court improperly rejected the no significant history mitigating factor based on offenses committed after the murders but before sentencing; (8)(a) the trial court failed to properly instruct the jury regarding the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating factors; (8)(b) the penalty-phase jury instructions and the prosecutor's closing argument precluded the jury from considering sympathy in recommending a sentence; (8)(c) the trial court erred in refusing to answer two jury questions relating to when Harvey would be eligible for parole and whether life sentences would be imposed consecutively; (8)(d) the trial

court erred in denying Harvey's special requested penalty-phase instructions; (9) the penalty-phase jury instructions improperly shifted the burden to Harvey to prove that the mitigating factors outweighed the aggravating factors, and trial counsel was ineffective for failing to object to them; (10) the heinous, atrocious, or cruel instruction was unconstitutionally vague, and trial counsel was ineffective for failing to object to the lack of a limiting instruction; (11) the cold, calculated, and premeditated instruction was unconstitutionally vague, and trial counsel was ineffective for failing to object to the lack of a limiting instruction; (12)(a) the State withheld the fact that witness Griffin had been used as a jail-house informant in other cases; (12)(b) the State withheld the fact that Harvey requested counsel after his arrest; (13) Florida Rule of Criminal Procedure 3.851 violates Harvey's rights to due process, equal protection, and access to the courts; (14) the jury was improperly instructed that its role was merely advisory; (15) the State improperly argued victim-impact evidence; (16) trial counsel was ineffective for failing to object to the admission of evidence that Harvey threatened to kill a fellow inmate; and (17) Florida's system for funding the defense of indigent capital defendants violates due process and equal protection.

At the outset, we find no merit to claims 12(a), 12(b), 13, 15, and 17, and we dismiss those claims without discussion. Also, issues that could have been, but were not, raised on direct appeal are not cognizable through collateral attack. *Johnson v. State*, 593 So.2d 206 (Fla.), *cert. denied*, 506 U.S. 839, 113 S.Ct. 119, 121 L.Ed.2d 75 (1992). Therefore, claims 5(a), 5(b), 5(c), 6, 8(c), and 9[2] are procedurally barred from review in this proceeding because they could have been

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[2] The portion of claim 9 pertaining to ineffective assistance of counsel will be discussed in another part of this opinion.

raised on direct appeal. Further, postconviction proceedings are not to be used as a second appeal. *Swafford v. Dugger*, 569 So.2d 1264, 1267 (Fla.1990). Therefore, claims 8(b), 8(d), and 14 are procedurally barred as these issues were raised on direct appeal. It is also not appropriate to use a different argument to relitigate the same issue. *Medina v. State*, 573 So.2d 293, 295 (Fla.1990). Hence, claim 1(a) is procedurally barred, with the exception of the portion of the claim relating to the booking sheet, because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court. Claim 1(e) is also procedurally barred as the issue of evidence of Harvey's pretrial escape was raised on direct appeal.

The trial court held an evidentiary hearing on issue 1(b), in which Harvey argued that trial counsel was ineffective during the voir dire for failing to challenge juror Brunetti.[3] During voir dire, Brunetti had stated that she could not be impartial because she had read in the newspaper and heard on television that Harvey had confessed to the crime. Harvey's trial counsel, who had previously worked on many other capital cases, testified that because of the strong evidence of guilt and the fact that Harvey's motion to suppress the confession had been denied, he had concluded that there was no chance of obtaining an acquittal. While he had no independent recollection of juror Brunetti, upon reviewing the transcript he concluded that her responses indicated that she was receptive to psychological testimony. In the course of her testimony, she had observed that while the death penalty was a deterrent to the person sentenced, she did not "necessarily believe that two wrongs made a right." Harvey's counsel expressed the opinion that it was reasonable

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[3] When one of the jurors became ill, alternate Brunetti was seated as a juror.

strategy to accept juror Brunetti and concentrate on the penalty phase.

We hold that there was competent and substantial evidence to support the lower court's finding that defense counsel made a reasonable decision not to challenge Brunetti based on his strategy of attempting to find jurors likely to recommend a life sentence instead of the death penalty. Thus, Harvey has failed to demonstrate that counsel's performance was deficient during the voir dire. We likewise reject Harvey's claim 4 that he was tried by a de facto eleven-person jury.

In claim 1(f), Harvey argues that he was denied effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Harvey's guilt in the opening argument. Harvey maintains that this concession nullified his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Because the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue. *See* Nixon v. State, 572 So.2d 1336 (Fla.1990), *cert. denied,* 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991).

Harvey also contends in claim 1(a) that he was denied effective assistance of counsel in the guilt phase when his trial counsel failed to argue for suppression of Harvey's confession based on a copy of a booking sheet. In his 3.850 motion, Harvey appended a copy of a booking sheet with his name on it which indicated that he wished to speak to an attorney. The copy of the booking sheet bears no time or date. Harvey claims that the booking sheet was generated at 6:35 a.m. on the day of his arrest. Therefore, Harvey argues that the booking sheet would have been important in his motion to suppress because it preceded his confession.

Harvey further claims that the copy of the booking sheet was in his trial counsel's files at the time he moved to suppress Harvey's confession.

If authentic and if signed at 6:35 a.m., the booking sheet might bear on Harvey's claim of ineffective assistance of counsel in relation to the motion to suppress. We do not feel that this claim can be resolved without an evidentiary hearing and therefore remand to the trial court.

We also find merit to Harvey's claims 2(a) and 3 regarding ineffective assistance of counsel during the penalty phase. The sentencing court found four aggravating factors[4] and as a mitigating circumstance found that Harvey had a low I.Q. and poor educational and social skills. During the penalty phase, defense counsel presented seventeen witnesses including Dr. Petrilla, a clinical psychologist who conducted psychological testing on Harvey. These witnesses testified that Harvey came from a loving family and was a decent, dependable, hard-working individual. The evidence presented also tended to prove that Harvey was of below normal intelligence, was depressed, and was a quiet and passive person. The evidence was intended to show that Harvey had many socially redeeming qualities and deserved mercy from the jury.

In his 3.850 motion, collateral counsel presented substantial mitigating evidence depicting Harvey's childhood as deprived and violent and portraying Harvey as a person with

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[4] The murders were found to be (1) especially heinous, atrocious, or cruel; (2) committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission or the attempt to commit robbery or burglary. § 921.141(5)(d), (e), (h), (i), Fla.Stat. (1983).

a history of substance abuse. In addition, affidavits made by a psychiatrist state that Harvey suffered from organic brain damage and debilitating depression at the time of the offense. Harvey also alleges that Dr. Petrilla recommended to defense counsel that Harvey be evaluated by an experienced psychiatrist. We believe that this allegation along with the evidence contained in the pleadings is sufficient to require an evidentiary hearing to determine whether defense counsel was ineffective for failing to uncover and introduce this evidence at trial.

A number of Harvey's other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel. Therefore, in view of the fact that we have already determined to remand for an evidentiary hearing on Harvey's penalty claims 2(a) and 3, we also remand his penalty claims 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), and 16 for consideration at the same time.[5]

Harvey argues in claim 7 that the mitigating circumstance of lack of a significant history of prior criminal activity[6] existed in Harvey's case because of *Scull v. State*, 533 So.2d 1137 (Fla.1988), *cert. denied*, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989), which was decided after *Harvey*. In *Scull*, we found when considering the existence of this mitigator, the term "prior" means before the commission of

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[5] Harvey's penalty phase claim 9 to the extent it pertains to ineffective assistance of counsel is without merit as a matter of law.

[6] § 921.141(6)(a), Fla.Stat. (1983).

the murder. In the instant case, the basis of the trial court's rejection of this mitigator was because Harvey had escaped from jail while awaiting trial on the murder charges. We reject Harvey's contention because at the time of Harvey's sentencing, the law provided that any significant criminal activity "prior" to sentencing precluded the finding of this mitigating circumstance. *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). *Scull* was not a fundamental change in the law that requires retroactive application. *See Lucas v. State*, 568 So.2d 18 (Fla.1990) (prosecutor's jury argument that mitigation of no significant prior history of criminal conduct should be rejected because of contemporaneous criminal conduct in violation of *Scull* was not fundamental error).

Finally, Harvey argues in claims 10 and 11 that both the standard jury instructions on the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators given in this case were unconstitutionally vague.[7] Because Harvey did not object to these instructions or request legally sufficient alternative instructions, these claims are procedurally barred. Further, Harvey's trial counsel cannot be deemed ineffective under the test set out in *Strickland* for failing to object to these instructions when this Court had previously upheld the validity of these instructions. *See Kight v. Dugger*, 574 So.2d 1066 (Fla.1990); *White v. Dugger*, 565 So.2d 700 (Fla.1990); *Ruffin v. Wainwright*, 461 So.2d 109 (Fla.1984). Harvey's claim 8(a) that the trial court failed to properly instruct the jury regarding these circumstances is likewise without merit.

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[7] Harvey raises these claims in light of the United States Supreme Court decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and this court's decision in *Jackson v. State*, 648 So.2d 85 (Fla.1994).

Habeas Petition

Harvey raises seven issues in his petition for a writ of habeas corpus: (1) he was denied effective assistance of counsel on direct appeal;[8] (2) the record does not support the heinous, atrocious, or cruel finding; (3) the cold, calculated, and premeditated aggravating factor was not properly found; (4) the trial court improperly rejected the mitigating circumstance of lack of a significant history of prior criminal activity; (5) *Caldwell*[9] error occurred; (6) rule 3.851 as applied to Harvey resulted in a violation of Harvey's constitutional rights; and (7) Florida's system for funding the defense of indigent capital defendants is constitutionally invalid.

Appellate counsel's failure to raise nonmeritorious claims is

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[8] In this claim Harvey argues that appellate counsel was ineffective for failing to: (a) raise the trial court's failure to dismiss juror Brunetti; (b) raise the trial court's denial of Harvey's motion for a new trial based on an alleged *Brady* violation; (c) assert that the trial court did not fully consider all the mitigating circumstances; (d) raise the trial court's denial of the penalty phase instructions requested by Harvey; (e) challenge the trial court's denial of an instruction regarding the mitigating factor of Harvey's substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law; (f) challenge the trial court's denial of Harvey's motion to appoint co-counsel; (g) argue that the evidence relating to the gun taken from witness Variotto's vehicle was inadmissible under the *Williams* rule and for failing to argue that the flight evidence was improperly admitted; (h) challenge the denial of Harvey's request for a jury instruction supporting his theory of defense; (i) challenge the denial of Harvey's request for an instruction on the underlying felony of burglary; (j) challenge the presentation of victim-impact evidence; and (k) challenge the restriction on cross-examination of the medical examiner.

[9] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

not ineffective assistance of counsel. *Swafford*, 569 So.2d at 1266. If appellate counsel had raised the issues now set forth in claim 1, we would have found them to be without merit. Therefore, claim 1 is denied. Claims 2, 3, and 5 were raised on direct appeal and are now procedurally barred. *Smith v. State*, 445 So.2d 323 (Fla.1983), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2671, 81 L.Ed.2d 375 (1984). Claims 4, 6, and 7 duplicate claims raised in the rule 3.850 appeal discussed previously in this opinion.

Accordingly, we deny the petition for a writ of habeas corpus. We reverse the trial court's summary denial of the postconviction motion as to those issues specified in this opinion as being legally sufficient allegations and remand that portion of the case to the trial court. On remand, the trial court should conduct an evidentiary hearing and rule on the above specified allegations raised in Harvey's motion. We affirm the order denying the motion for postconviction relief on all other issues.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

Appendix D

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR THE OKEECHOBEE COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NO. 86-75 CF

HAROLD LEE HARVEY, JR.
_____/

AMENDED ORDER ON MOTION FOR POST CONVICTION RELIEF

THIS CAUSE is before the court on motion by Harold Lee Harvey, Jr., for post conviction relief, and the court having considered said motion and the state's response thereto, the remand opinion of Harvey vs. Dugger, 656 So. 2d 1253 (Fla. 1995), evidence presented, and argument and authorities cited, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

1. That the evidence proves the following facts:

a. Approximately 6:20 A.M. February 27, 1985 Harold Lee Harvey was arrested for two counts of second murder and one count of armed robbery.

He was transported to the Okeechobee County jail and arrived approximately 6:30 A.M. He was partially booked at that time. The booking officer only asked Harvey his name and noted a $3,000,000 bond. Harvey was not asked if he wanted a lawyer.

Harvey was immediately taken to an adjacent office and interviewed by Florida Department of Law Enforcement Officer Pete Lanier, Okeechobee County Chief Deputy O.L. Raulerson and Deputy Sheriff Gary Hargraves. During the interview, which lasted through the afternoon, Harvey made two incriminating statements, one at 3:07 P.M. At no time during the interview did Harvey ask for a lawyer.

b. Although Assistant Public Defender Clyde Killer came to the jail twice to see Harvey during the interview, one time at approximately 2:20 P.M., there is no indication that either Harvey or his family requested Mr. Killer's presence. Mr. Killer did see Mr. Harvey after he had made his statements.

c. A booking sheet was completed on Harvey by Corrections Officer Rose Marie Bennet at approximately 5:50 P.M. while Mr. Killer was present. On the sheet Harvey indicates he wishes to have a lawyer. (Ms. Bennet arrived for her shift that day at 3:40 P.M., and asked Mr. Harvey the question about counsel after that time.)

At 6:10 P.M. a First Appearance hearing was held before County Judge Burton Conner for both Harvey and co-defendant Stiteler.

Mr. Harvey was photographed and finger printed at approximately 7:15 P.M.

d. Later Mr. Harvey tried to cut his wrists with a sharpened coin and also tried to hang himself.

e. Anticipating that Mr. Harvey would be charged with one or more counts of first degree murder, the circuit judge assigned to criminal cases in Okeechobee County asked Attorney Robert J. Watson to represent him, and after interviewing Harvey he consented and was appointed counsel. Mr. Watson had previously participated in the defense of persons charged with potential death

penalty crimes and attended "Life Over Death" seminars. This was his first case as lead counsel in a potential death penalty case.

Mr. Harvey and co-defendant Stiteler were both indicted for two counts of first degree murder; the State indicated it would seek the death penalty as to both.

f. Mr. Watson prepared the case for trial, including obtaining court authorization to employ a psychologist and psychiatrist if necessary. Mr. Watson felt that Harvey was worth saving and that the jury would recommend a life sentence if Harvey was convicted because of the circumstances of the killings and Harvey's life problems and the apparent out of character nature of the killings.

Mr. Watson applied for and received court permission to employ a private court investigator. He discharged the first investigator he hired after approximately five months because the investigator was unable or unwilling to comply with Mr. Watson's requests, although he did obtain statements from approximately 15 witnesses. A second investigator was employed, and this investigator assisted with interviewing of witnesses and concluding trial preparations.

Psychologist Fred Petrilla Ph.D., was retained after court permission and he examined Mr. Harvey. Dr. Petrilla was not given a psycho-social history of the defendant. Harvey also did not discuss the facts of the charges with Dr. Petrilla on advise of Mr. Watson because of a pending motion to suppress Harvey's statements. Dr. Petrilla performed a personality assessment and other psychological tests on Mr. Harvey. Dr. Petrilla's findings and conclusions were that Harvey suffered from post traumatic stress syndrome and had a dependent personality. He did not do a forensic evaluation but did test Harvey's IQ. He

recommended that Mr. Harvey be given anti-depressive medications and receive individual psychotherapy with assertiveness training. He did test Mr. Harvey for organic brain damage but did not diagnose Mr. Harvey as having such damage.

Mr. Watson met with Mr. Harvey's mother and father and siblings and ate dinner in their home on two occasions. He felt they were good, decent people. He also obtained Mr. Harvey's school records. He did not uncover any evidence that Harvey used or abused cocaine or marijuana or quaaludes, that he drove an automobile drunk, or that his parents abused him. He determined that Harvey was involved in a very serious automobile accident at age 16 where he lost consciousness and a female companion was killed. He determined that Harvey had never been institutionalized.

Dr. Petrilla also interviewed the Harvey family and Harvey's co-workers.

On May 22, 1986 Mr. Watson and Dr. Petrilla conferred, and Dr. Petrilla recommended Carmen Ebalo, MD as an examining psychiatrist for Mr. Harvey so that the a expert could verify Dr. Petrilla's opinion and assure that it was comprehensive.

Mr. Watson decided not to employ a psychiatrist because he felt that if there were conflicts between two experts the jury might disregard all the mental health evidence. He also felt that the jury might see calling more than one mental health expert as trying too hard to make a bad excuse for bad behavior because Harvey had never been treated for mental illness.

Mr. Watson did before trial move the court to obtain a postponement between the guilt and penalty phases of the trial, alleging grounds that he wished to obtain a psychiatric

evaluation of Harvey if Harvey was convicted. The motion was denied.

No claim was raised by Mr. Watson concerning the booking sheet in regard to suppression of Harvey's confession. Mr. Watson does not recall ever having a copy of the booking sheet, however a copy was found in his office file by a lawyer subsequently representing Mr. Harvey.

Mr. Harvey never told Mr. Watson that he had asked to talk with a lawyer before he made his confession, and he told Mr. Watson the same version of the events as he told the interrogating police officers.

Mr. Watson and Mr. Harvey discussed a guilty plea if the state would waive the death penalty, however State Attorney Bruce Colton rejected this potential deal, and no deal offer was ever made by the state.

g. Mr. Watson obtained a severance of the two defendants for trial, and Mr. Harvey's trial commenced in June 1986 with jury selection. The trial judge denied Harvey's motion to suppress his confession before the jury was sworn.

Because Mr. Watson felt the confession "was the case," he had discussed with Mr. Harvey during case preparation what his defense could be and that they probably would admit some degree of murder if the confession was not suppressed. They specifically discussed on more than one occasion that if the confession was ruled admissible, Watson would make an opening statement that Harvey was guilty of murder, but that it was second degree murder and not either premeditated or felony murder. Mr. Harvey said he understood this defense tactic.

Watson stated to the jury during his opening statement that the evidence would show a murder was caused by a frightened and confused young Mr. Harvey after he and

his friend had robbed the victims. He stated that Harvey did not intend to kill.

h. Harvey's tape-recorded confession was admitted into evidence as was physical evidence of the crime scene and of the recovery of a murder weapon. The physical evidence and Harvey statement supported a factual finding that the two victims heard Mr. Harvey and Mr. Stiteler arguing concerning the necessity of killing them and then tried to flee. Harvey and Stiteler had brought masks but never put them on, and Mr. Harvey was recognized by the Boyds.

Mr. Watson was concerned about losing credibility with the jury. For this reason felt he should not ague that Mrs. Boyd did not hear the Harvey-Stiteler conversation even though there was also evidence that she was hard of hearing and that the television was turned loud so she could hear it.

Evidence was introduced over Mr. Watson's objection of a death threat by Mr. Harvey toward another county jail inmate while Harvey was awaiting trial. In order then to molify the effect of this testimony, Watson examined the corrections officer witness concerning the mutual nature of the combat and that each of Harvey and the other inmate would have tried to kill the other if given the chance.

Evidence was also introduced that Harvey had escaped while awaiting trial. Mr. Watson's objection of improper prejudice outweighing relevancy was overruled. An escape note beginning with a phrase meaning "It's a good day to die," was admitted.

There was no evidence that Mr. Harvey was under the influence of alcohol or any other drugs the day of the killings.

i. During the jury instruction conference Mr. Harvey participated and personally waived instructions on excusable and justifiable homicide.

During final argument the prosecutor argued that the evidence had not shown everything Mr. Watson had said it would. Mr. Watson objected to this argument as striking at the defendant over the back of his lawyer because he intended to present the additional evidence during a penalty phase if there was a conviction.

Mr. Harvey was found guilty by the jury of two counts of first degree murder.

j. After the guilty verdict Harvey became less motivated to assist his lawyer, however he did not have any difficulty participating in the guilt phase of the trial, and he did appear to understand what occurred during the penalty phase.

During the penalty phase the defendant presented 16 witnesses including Dr. Petrilla who testified that he had been a state's witness in earlier cases and that this was the first time he had testified in a death penalty case for a defendant.

The evidence including Dr. Petrilla's testimony showed that Harvey was depressed, had low self-esteem and a mental age of 18 and physical age of 23, did not have brain damage, and was impulsive. Evidence was also presented that he was hard-working, from a good, decent family who would be negatively effected if he would be executed, that he had been a loving brother to his disabled sister, that the crime was out of character, and that he was pressured by his wife to provide things he could not financially do. Evidence showed that he was involved in the fatal accident at age 16 and would be able to adapt to a life sentence in prison.

Harvey's parents and siblings testified to establish his history, and Mr. Watson provided each with a memorandum of the questions he would ask and the answer he thought they would give.

Harvey chose not to testify during the penalty phase, although he had indicated earlier that he would testify.

k. Mr. Watson did not waive the statutory mitigator of lack of prior significant criminal history even though as of 1986 the existing law defined "prior" as meaning prior to sentence and not prior to offense. This was because the state had already introduced evidence during the guilt phase of Mr. Harvey's escape from jail and theft of a motor vehicle while he was awaiting trial.

Mr. Watson requested a jury instruction on substantial domination, and this was denied.

Mr. Watson then decided not to argue that Mr. Harvey was under substantial domination by another because the evidence showed that Harvey was older than Stiteler, they went to the crime scene in Harvey's car, Harvey was married with marital pressures, and Harvey was the trigger man and had immediately taken the AR-15 from Stiteler's hands immediately before shooting.

Mr. Watson argued that the killings were out of character for Mr. Harvey and emphasized that the killings occurred while Harvey was in a state of panic after the robberies were completed, that there was no intent to kill, and that Harvey's confession showed him to be a remorseful and regretful person, thus maintaining consistency between his guilt and penalty phase positions. The final argument was a well-organized plea for mercy.

The jury recommended the death penalty by a vote of eleven-to one. Neither the state nor Mr. Watson presented

additional evidence to the judge before Mr. Harvey was sentenced.

l. Harold Lee Harvey, Jr., was sentenced to death for two counts of murder in the first degree.

m. During the time Mr. Watson knew Mr. Harvey while working on the trial case, Mr. Harvey's personality did not appear to change. He appeared to be normal and did not act unusual when in Mr. Watson's company. Mr. Watson describes him as a docile client.

n. After conviction and sentence Mr. Harvey was evaluated in 1990 and 1996 by psychiatrist Michael A. Norko, MD. Dr. Norko also interviewed Harvey's mother and two sisters. He states that the Harvey home was abusive and that both parents drank alcohol to excess as did Harvey and his siblings, and that Harvey's automobile accident at age 16 caused him to drink alcohol daily and receive failing grades in school. He relates that Mr. Harvey was in love with a woman who left him in 1982 and that he was a user of cocaine, quaaludes, and LSD. He further states that Harvey married in December 1984 and was unable to make enough money to please his wife. He relates that Harvey's wife made all of the family decisions and that Harvey could not develop a life plan and lacked insight and judgment, and that he exhibited bizarre behavior such as shooting out a street light with a gun. He opines that although Stiteler was the younger of the two, he dominated Harvey and could get him to do almost anything. He also opines that Harvey was suicidal because before the killings he drove a car into a bridge and exhibited "crazy" driving, and put a loaded pistol to his head, and after his arrest cut his wrists, attempted to hang himself, and escaped. He diagnoses Harvey as suffering from an organic brain dysfunction, a major depressive disorder, a dependant disorder, post traumatic stress syndrome and substance abuse and opines that these

diagnoses tend to prove the mitigating factors of lack of capacity to appreciate criminality, domination by another person and extreme mental disturbance.

PhD psychologist Brad Fischer examined and evaluated Mr. Harvey after trial. He met with Mr. Harvey for seven hours in 1990 and conducted clinical testing on him. They discussed the crime. Dr. Fischer also reviewed affidavits of people who knew Harvey and Harvey's medical and school records. He retested Mr. Harvey in August 1998. He concludes that Mr. Harvey was a substance abuser from age 14, that he may have been the victim of pesticide poisoning as a child, and that Mr. Harvey's severe automobile accident resulted in behavior and memory changes. He opines that Mr. Harvey should have been evaluated by a psychiatrist and that the three statutory mitigators of lack of capacity to appreciate criminality, domination by another person and extreme mental disturbance were present at time of trial.

Evidence is now available that Mr. Harvey's mother and father both grew up in poverty-stricken alcoholic homes and married when the senior Mr. Harvey was 20 and Mrs. Harvey was 15. There is evidence that the family did not have enough money for food or routine medical care, that the parents and four children lived in a four bedroom house, that Harvey worked to help with family finances, and that as a child he played in agricultural canals which may have contained pesticides. There is evidence that Harvey's father was an alcoholic and struck him with a stick or belt to discipline him, was abusive to Harvey's mother and that the family was not loving. There is evidence that Harvey's wife was demanding and withheld sex from him. There is evidence that Harvey repeated questions asked of him, played "chicken" with a semi-tractor while drunk and while his sister was in the car with him, that he wrecked two cars, and that he was depressed before his marriage after breaking

up with another girlfriend. There is evidence that on one occasion Harvey choked his sister into unconsciousness and that the severe automobile accident left him a changed person - slower, appearing to "go blank," and having difficulty concentrating. There is evidence that Harvey was hit in the head with a tire iron but did not receive medical treatment and that he used cocaine, marijuana, and alcohol on a daily basis. There is evidence that Harvey's aunt suffers from some form of psychosis and that Harvey's head was 'funny" shaped at birth.

Dr. Petrilla is now qualified as a neuropsychologist and testifies that he may not have correctly evaluated Mr. Harvey's testing concerning possible organic brain dysfunction and organic brain damage. He testifies that he did not know in 1985 and 1986 of his inadequacy to evaluate organic brain damage.

2. That based upon the above facts the following conclusions of law are reached:

Defendant's claim of ineffective assistance of counsel fails for want of proof that his trial counsel's performance was deficient (The second prong of the Strickland v. Washington test is thus not discussed.)

a. Because defendant's booking procedure question whether he wished a lawyer occurred after his confession, introduction of a copy of the booking sheet (which indicates he then wanted a lawyer) during the suppression hearing would have proven no relevant fact.

b. Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not

per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

c. Of the sixteen witnesses called by defendant during the penalty phase, the facts show that none testified that Mr. Harvey used illicit drugs or alcohol, that he had brain damage, that he was violent, or that he was an abused child. (Many of these same witnesses now seek to prove these facts.) The trial strategy was to show defendant as a good person who had a positive family upbringing. This was done. Speculating now that another strategy may have produced a different result does not show ineffectiveness.

d. Mr. Watson proved that Harvey was depressed and unable to support his wife, suffered from low self esteem, was insecure, immature, anxious, guilt-ridden, suicidal, remorseful, possessed of a low IQ, the victim of a tragic automobile accident, and able to adapt to a prison environment. These establish that Mr. Watson effectively presented a valid sentencing hearing defense.

e. Mr. Watson was concerned about Harvey's mental health - both his competency to stand trial and whether there were mitigators that might be proven in a sentencing hearing. The expert who examined the defendant, Fred Petrilla, PhD, testified that Harvey did not have brain damage and that he suffered from a dependant personality disorder and proved the mental state of defendant referred to above. The experts who have later examined defendant concede that there is no expert proof of any particular cause of brain damage. Self-inflicted drug and alcohol use, an automobile accident, being hit in the head with a tire iron,

swimming in drainage canals, and being born with a "funny" shaped head are seen only as possible causes of brain damage. There is not a showing of ineffective assistance of counsel for failure to ensure a competent mental health examination.

f. Also evidence of defendant's choking his sister, shooting out a streetlight, and playing "chicken" with another vehicle while his sister was a passenger in his car would have been placed before the jury if defendant's current mental health experts had testified. This evidence would certainly have undermined the "good person" defense.

g. Omission of evidence that was not discovered before trial (and which may not even have been available and which may have been detrimental to defendant) in this case does not show ineffective assistance.

h. The evidence available to and presented by defense counsel at trial, which included the defendant's statements, was not legally sufficient to require the court to give a jury instruction that defendant was under the substantial domination of another. The instruction was requested and denied. The fact that there are now experts who state they would give opinions of substantial domination does not show ineffective assistance, particularly; as here, where the expert who examined the co-defendant opined that the co-defendant was under the substantial domination of Mr. Harvey.

i. The plea for mercy final argument was not ineffective assistance of counsel.

j. Evidence of Harvey's escape from jail was introduced during the guilt phase of the trial. The only crime for which defendant was convicted before the murders was a misdemeanor. Not waiving the mitigating factor of lack of prior record was not ineffective.

k. As noted above defense presented evidence at trial of remorse and that defendant would do well in prison. The state could validly argue whether these factors were proven, as in the case of any factor the defense was contending. This cannot be construed to be ineffective.

l. Failure to argue further before the judge alone prior to actual sentencing and failure to argue a matter that could result in loss of credibility with the jury are neither ineffective.

m. Mr. Watson objected on relevancy grounds to the introduction of evidence that Harvey threatened to kill a fellow jail inmate. When the objection was overruled, and he introduced evidence to prove that the incident was incited by the other inmate, this was not ineffective.

n. The overall and specific effects of Mr. Watson's efforts were effective assistance of counsel.

3. That the motion for post-conviction relief is denied.

4. That defendant has the right to appeal within 30 days of the rendition of this order.

DONE AND ORDERED this 26th day of January 1999 in chambers.

/s/Dwight L. Geiger
DWIGHT L. GEIGER,
CIRCUIT JUDGE

cf: Lawrence Mirman, Esq.
Ross B. Bricker, Esq.

I hereby certify that a copy of the above order has been served upon the defendant by U.S. Mail this _____ day of January 1999.

SHARON ROBERTSON
CLERK OF CIRCUIT COURT

By:_____
as Deputy Clerk

Appendix E

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NO. 86-322B

HAROLD LEE HARVEY, JR.

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE is before the court on motion by the above defendant for post-conviction relief under provision of Rule 3.850, Florida Rules of Criminal Procedures, and the court having considered said motion and the State's response thereto and the files and records in this case, and further having considered evidence and argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

1. That the motion and the files and records in the case conclusively show that defendant is entitled to no relief on his Claims IA., IC., ID., IE., IF., and all of Claims II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, and XVII. A copy of that portion of the files and records in this case which conclusively show defendant is entitled to no relief on these claims is attached hereto.

2. That after an evidentiary hearing on Claim IB. of defendant's motion, the court determines that defendant is not entitled to relief, defendant having neither proven serious errors that denied him of his right to counsel nor actual

prej[illegible]e that deprived him of a fair trial. See Strickland v. Wash[illegible]ton, 466 U.S. 664 (1984).

3. That defendant's motion for post-conviction relief is denied.

4. That defendant has the right to appeal within thirty days of the rendition of this order.

DONE AND ORDERED this 17th day of March 1993 in chambers.

/s/Dwight L. Geiger
DWIGHT L. GEIGER, Circuit Judge

cf: Celia A. Terenzio, Esquire
Steven F. Samilow, Esquire
David C. Morgan, Esquire

(copies of attachments furnished to Celia A. Terenzio and Steven F. Samilow.)

I hereby certify that a copy of the above order has been served upon the defendant by U.S. Mail this __ day of March 1993.

JEFFREY K. BARTON
Clerk of the Circuit Court

By: _____
as Deputy Clerk

Appendix F

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 8, 2007

CASE NO.: SC95075
Lower Tribunal No.: 86-322B

HAROLD LEE HARVEY vs. STATE OF FLORIDA,

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

/s/Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

kb
Served:

HON. LAWRENCE M. MIRMAN
HON. WILLIAM L. ROBY, CHIEF JUDGE
ELLEN C. LAMOND
ROSS B. BRICKER
JEFFREY A. KOPPY
CELIA A. TERANZIO

LESLIE CAMPBELL
HON. SHARON ROBERTSON, CLERK
HON. JEFFREY BARTON, CLERK

Appendix G

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Appendix H

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA

CASE NO. 86-322B

HAROLD LEE HARVEY, JR.,	)
	)
Plaintiff, Appellant,	)
	)
vs.	)
	)
STATE OF FLORIDA,	)
	)
Defendant, Appellee.	)

TRANSCRIPT OF TRIAL

Friday, June 13, 1986

VOLUME VI

JURY SELECTION

Trial before the Honorable Dwight L. Geiger, Circuit Judge, held at the Indian River County Courthouse, Vero Beach, Florida, commencing at 11:00 a.m. on the day and date above set forth.

what you tell us may affect another juror, so we want to avoid that. And that's the reason we have talked with the jurors in chambers rather than out there if they know something about the case.
What we'll do in your situation is I'll talk with you about that and then I'll let the lawyers talk with you about any questions at all that they wish to ask of you.
MRS. BRUNETTI: Okay.
THE COURT: And we probably will not go back into the courtroom and talk with you further back in the courtroom again.
First off, let me mention that the charge which is made here is charged to have occurred, the offense which is charge here, is charged to have occurred in May of 1985, and that's about a year and a half ago.
MR. WATSON: February.
MR. COLTON: February.
THE COURT: Excuse me, February of '85. You're ahead of me. It's been a long week.
Again, about a year and a half ago. There was news coverage of that particular event at that time plus there has been news coverage at various times since then. News coverage has been on television, channel 34, and one or more of the West Palm Beach stations have had coverage.
MRS. BRUNETTI: Yes.

THE COURT: The Press Journal has had some coverage, the Miami Herald has had coverage; other newspapers have had coverage.
There has been coverage on at least one Vero Beach radio station as well.
Now, do you know anything about this case other than from news coverage?
MRS. BRUNETTI: Just what I read and what I saw on the TV.
THE COURT: Has anyone who may have direct knowledge themselves about the case told you something about it?
MRS. BRUNETTI: No.
THE COURT: Okay. Now, you've seen something on television; is that correct?
MRS. BRUNETTI: And the Miami Herald.
THE COURT: And the Miami Herald, okay. When did you come in contact with this coverage?
MRS. BRUNETTI: Well, last year when it happened. And I can't tell you what date but I read the paper every day and I watch the news every night.
THE COURT: What do you recall?
MRS. BRUNETTI: Well, I recall that he confessed to doing it and that's why I feel that I couldn't be, you know, impartial about it

THE COURT: Why do you think there was a confession?
MRS. BRUNETTI: Because I think he did it. I think he did it and he confessed to doing it.
THE COURT: Why do you think there was a confession? Was that in the news coverage?
MRS. BRUNETTI: I think I read that he confessed to it, or I saw it on the TV.
THE COURT: You know there is more than one person that was charged?
MRS. BRUNETTI: Yes, two. There are two.
THE COURT: What was the name of the person who confessed; do you know that?
MRS. BRUNETTI: Harvey.
THE COURT: You're sure of the name?
MRS. BRUNETTI: Yes.
THE COURT: Do you know the name of the other who was charged?
MRS. BRUNETTI: I saw it but I can't remember exactly what his name is.
THE COURT: What else do you recall about the case?
MRS. BRUNETTI: I just recall seeing it and reading it in the paper that two people were murdered.
THE COURT: Do you recall any of the incidents about the events?

MRS. BRUNETTI: That it was a robbery case. They robbed the people and that they had a big dairy farm or something, farmers of some kind.
THE COURT: What you recall about the case or think you recall about the case, would that affect your ability to be fair and impartial here and confine your decision in the case only to the evidence and the law that I will instruct you?
MRS. BRUNETTI: I don't think I could be impartial after reading about it.
THE COURT: Do you know anything about Mr. Harvey individually?
MRS. BRUNETTI: No.
THE COURT: From any source?
MRS. BRUNETTI: No. Just that he was, he and another boy and what they have said here is all.
THE COURT: Mr. Colton?
MR. COLTON: When you read in the paper or saw on the news that he had confessed, did it say in what you saw what it was that it was in his confession or just the fact that he had confessed?
MRS. BRUNETTI: I think it said that he had confessed to killing them.
MR. COLTON: But did it go into any detail as to what the confession was?

MRS. BRUNETTI: I can't remember. I don't think so.
MR. COLTON: Okay.
MRS. BRUNFTTI: Just said that he had signed a confession. That he had been apprehended.
MR.. COLTON: One of the instructions on the law that the Judge will give you is that you're to put aside anything that you read or heard about the case and form your verdict based on the evidence that you heard in the courtroom; could you do that?
MRS. BRUNETTI: I don't know if I honestly could.
MR. COLTON: Okay. That's all that I have.
MR. WATSON: I have a few questions, Judge.
THE COURT: Yes, sir.
MR. WATSON: Mrs. Brunetti, where are you from originally?
MRS. BRUNETTI: I'm born and raised south of Buffalo, New York.
MR. WATSON: How many years did you live there?
MRS. BRUNETTI: Until I was about 20.
MR. WATSON: Where did you go to after you left there?
MRS. BRUNETTI: I lived in New York for a year and then I came to Florida.
MR. WATSON: In New York City?

MRS. BRUNETTI: Yes, about a year.
MR. WATSON: Okay. Where did you live in Florida when you first got here?
MRS. BRUNETTI: First I lived in Fort Lauderdale and then Hallandale.
MR. WATSON: You worked at the water department there?
MRS. BRUNETTI: At the City of Hallandale.
MR. WATSON: Your name sounds a little bit familiar. Do you have any children, ma'am?
MRS. BRUNETTI: No, I don't.
MR. WATSON: No? Okay. How long have you lived in Vero?
MRS. BRUNETTI: Eight years approximately.
MR. WATSON: What part of the community do you live in?
MRS. BRUNETTI: Southwest; Pinecrest.
MR. WATSON: Okay. Do you remember when you saw or heard the publicity? Was it about a year and some ago or was it just recently? Because there has been different times of publicity.
MRS. BRUNETTI: No. When it first happened there was a big article about it. That's when I first saw it and I then saw it in the news.
MR. WATSON: What is your present perception as to

what happened based upon those articles?
MRS. BARNETTI : Well, I think they broke in, is the best that I can remember, and they robbed them or something and then they were afraid they would be identified
and they killed them.
MR. WATSON: Okay. Do you have any feeling at this time if that's what happened what the punishment would
be in that situation if that should happen?
MRS. BARNETTI: I'm kind of confused on the death penalty after listening to all of these different people. I think it's a deterrent because a person would not be able to
get out to do the same thing again. But I don't necessarily
believe that two wrongs make a right.
MR. WATSON: Okay. When you have some spare time,
ma'am, what types of things do you like to do?
MRS. BRUNETTI: I fish and I dance and I swim, ceramics.
MR. WATSON: Okay.
MRS. BRUNETTI: Jog.
MR. WATSON: And have you ever had any conversations with friends or relatives about psychology?
MRS. BRUNETTI: I have a sister that went to a psychologist for two years.
MR. WATSON: Do you think she was benefited or hurt by that experience?

MRS. BRUNETTI: She was benefited.
MR. WATSON: You mention that someone in your is in family was in law enforcement; is that right?
MRS. BRUNETTI: My brother-in-law for 26 years in Hallandale, he was a police sergeant.
MR. WATSON: Maybe that's why your name sounds familiar. What is his name?
MRS. BRUNETTI: Harold Cool.
MR. WATSON: Oh, that's not why it sounds familiar.
MRS. BRUNETTI: It's my sister's husband. He's deceased.
MR. WATSON: He is?
MRS. BRUNETTI: Yes.
MR. WATSON: Did he die as a result of illness or accident?
MRS. BRUNETTI: Illness.
MR. WATSON: When you say that you think he did it, do you mean that you think that he shot the people or when you say you think that he did it, do you mean you think he committed a certain crime?
MRS. BRUNETTI: I feel that he committed the crime that he was charged for.
MR. WATSON: First degree murder?
MRS. BRUNETTI: Yes.

MR. WATSON: But the Judge hasn't given you the instructions.
MRS. BRUNETTI: I know.
MR. WATSON: But from what all you said up there that's what, you know -- you've come to a conclusion as to what first degree murder is based upon what Mr. Colton and I said?
MRS. BRUNETTI: Yes.
MR. WATSON: You think that that falls into this category?
MRS. BRUNETTI: Yes.
MR. WATSON: Do you feel because Mr. Colton and I may not have explained to you as well as the Judge would later, do you think you could follow the Judge's instruction?
MRS. BRUNETTI: I can't honestly say that I could have an open mind after reading it and seeing it on the news. I have to be honest. I wouldn't want to get on the jury and not say what I feel.
MR:. WATSON: Okay. I don't have any other questions.
MR. COLTON: Neither do I.
THE COURT: You may step back into the courtroom, ma'am. Thank you.
MRS. BRUNETTI: Thank you.

THE COURT: Motions?
MR. COLTON: No motion, Your Honor.
MR. WATSON: No motion, Your Honor.
THE COURT: Are there any preemptories?
MR. COLTON: No.
MR. WATSON: No.
THE COURT: These two jurors will be our alternate jurors then?
MR. COLTON: Yes.
THE COURT: Okay. Let's go in, we'll swear them and we'll move ahead then.
(End chambers discussion)
THE COURT: Counsel, approach the bench for a moment.
(Following side-bar discussion was held out of the hearing of potential jurors)
THE COURT: Just so I understand, there is no motions for cause that have been made at this time?
MR. WATSON: That's correct.
THE COURT: State is not making a motion?
MR. COLTON: No.
MR. WATSON: Defense isn't making any motion for cause.
THE COURT: There are no preemptories at this time?

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA

CASE NO. 86-322B

HAROLD LEE HARVEY, JR., Plaintiff, Appellant,	)
vs.	)
STATE OF FLORIDA,	)
Defendant, Appellee.	)

TRANSCRIPT OF TRIAL

Friday, June 13, 1986

Monday, June 16, 1986

VOLUME VII

Trial before the Honorable Dwight L. Geiger, Circuit Judge, a jury of twelve, and two alternates, held at the Indian River County Courthouse, Vero Beach, Florida, commencing at 2:45 p.m. on the day and date above set forth.

we would ever salvage Mrs. Ronk as a juror at this stage. It would be very difficult from me to make her serve as a juror in light of the opinion of Dr. Kirby that she should be excused. Of course, all we have got is just a note.

MR. WATSON: We don't care about sanctions. What we care about is losing her as a juror which we think would be a benefit and doctors write notes all the time. My brother is a doctor and he has written some notes for people, I'm sure. But whether or not we need to bring a doctor in and question this juror, maybe we do. But I suppose I'm in the position where we can agree that we can go with the first alternate.

THE COURT: I think at this point the basic question -- and I want the record clear -- I am considering excusing Mrs. Ronk based upon the note from Dr. Kirby. And then that would mean if she is excused Mrs. Brunetti will be seated as a juror then. Is there any objection to doing that at this point?

MR. COLTON: Not for the State.

MR. WATSON: No, none from the Defense.

THE COURT: Okay. Mrs. Ronk is excused and Mrs. Brunetti will be the next juror then. What we will do, Mrs. Brunetti was sworn as an

Appendix I

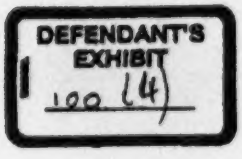
February 26, 1986

RE: HARVEY

MEMO TO FILE

I need to get ahold of a psychiatrist to examine Mr. Harvey. I should probably call one of the Desais in Fort Pierce.

bob/dw



00001703

Appendix J

00002223

PHONE CALL

Harvey

FOR Jose Portillo

DATE 5-22 TIME after 5 A.M. P.M.

PHONE AREA CODE NUMBER EXTENSION

MESSAGE knows a to use

Carmen Ebalo (ASL) Psychiatrist

give her a call + tell her

@ LA Mental Health Center

	TELEPHONED X
	RETURNED YOUR CALL
	PLEASE CALL
	WILL CALL AGAIN
	CAME TO SEE YOU
	WANTS TO SEE YOU

SIGNED

[redacted]